Supreme Court, U.S.
FILED

021861 JUN 12 2003

No.

IN THE

Supreme Court of the United States

HIEN AN DAO,

Petitioner

v.

C.A. TERHUNE, Director,
California Department of Corrections,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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24 pp

Table of Contents

	Page
Order Adopting Report and Recommendation of United States Magistrate Judge.....	App.34
Report and Recommendation of a United States Magistrate Judge.....	App.36

Table of Authorities

Page

Cases

California v. Green, 399 U.S. 149, 158 (1970)..... App.45
Christian v. Rhode, 41 F.3d 461, 468 (9th Cir. 1994)..... App.46
Brecht v. Abrahamson, 507 U.S. 619 (1993)..... App.52
Delaware v. Van Arsdale, 475 U.S. 673, (1986)..... App.50
Hernandez v. Small, ___ F.3d at ___, 2002 WL 356296..... App.46, 47
Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), *cert. denied*, 510 U.S. 887 (1993)..... App.45
Lilly v. Virginia, 527 U.S. 116 (1999)..... App.46, 47
Maryland v. Craig, 497 U.S. 836, 845 (1990)..... App.46
Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), *cert. denied*, 512 U.S. 1111 (1997)..... App.43
Ohio v. Roberts, 448 U.S. 56 (1980)..... App.46
Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987)..... App.45
United States v. Bowman, 215 F.3d 951 (9th Cir 2000)..... App.50
Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.)..... App.44
Weeks v. Angelone, 528 U.S. 225, 234 (2000)..... App.50

Williams v. Taylor, 529 U.S. 362, (2000)..... App.44
Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)..... App.45

Constitutional Provisions

Sixth Amendment..... App.45

Statutory Provisions

Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA")..... App.43, 44

28 U.S.C. § 636..... App.34
28 U.S.C. § 2254..... App.43, 44, 45, 52

California Penal Code ("P.C.")
§ 186.22..... App.37
P.C. §§ 187(a)..... App.37
P.C. § 12022.5(a)..... App.37
P.C. § 12022(a)(1)..... App.37

SUPPLEMENTAL APPENDIX

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 17 2002
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
MAY 16 2002
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HIEN AN DAO, Petitioner, vs. C.A. TERHUNE, Director, California Department of Corrections Respondent.	) Case No. CV 01-2422-) AHM(RC))) ORDER ADOPTING) REPORT AND) RECOMMENDATION) OF UNITED STATES) MAGISTRATE JUDGE))

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition and other papers along with the attached Report and Recommendation of United States Magistrate Judge Rosalyn M. Chapman, as well as petitioner's objections, and has made a de novo

determination.

IT IS ORDERED that (1) the Report and Recommendation is approved and adopted; (2) the Report and Recommendation is adopted as the findings of fact and conclusions of law herein; and (3) Judgment shall be entered denying the petition and dismissing the action with prejudice. The Court has corrected a typographical (name) error at p. 15:10, and the above three items are subject to that correction, which substitutes "Lam" for "Dao."

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and Judgment by the United States mail on the parties.

DATE: May 16, 2002

s/

A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
MAR 2 2002
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HIEN AN DAO, Petitioner, vs. C.A. TERHUNE, Director, California Department of Corrections Respondent.	) Case No. CV 01-2422-AHM(RC))) REPORT AND) RECOMMENDATION OF) A UNITED STATES) MAGISTRATE JUDGE)))

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, by Magistrate Judge Rosalyn M. Chapman, pursuant to the provisions of 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

BACKGROUND

I

On July 21, 1998, in Superior Court for the County of Los Angeles case no. KA035193, petitioner Hien An Dao was convicted by a jury of the first degree murder of

Lin Bao Vuong in violation of California Penal Code ("P.C.") § 187(a), and the jury also found that petitioner personally used a firearm in the commission of the murder within the meaning of P.C. § 12022.5(a), that a principal was armed with a firearm in the commission of the murder within the meaning of P.C. § 12022(a)(1) and that the murder was gang-related within the meaning of P.C. §§ 186.22(b)(1) and 186.22(b)(4). Return to Petition for Writ of Habeas Corpus ("Return"), Exh.A at 31.[1] The petitioner was sentenced to 25 years to life, plus five years on the personal use of a firearm enhancement, for a total term in state prison of 30 years to life. Id. At 32.

The petitioner appealed his conviction to the California Court of Appeal, which in an unpublished opinion filed December 13, 1999, affirmed the judgment; however, Judge Mallano was of the opinion the judgment should be reversed. Return, Exh. B. On January 21, 2000, petitioner, through his counsel, filed a petition for review in the California Supreme Court, which was denied on March 15, 2000. Return, Exh. C.

II

The California Court of Appeal, in affirming the petitioner's conviction, made the following findings regarding his and Lam's case:[2] The Asian Boyz gang and the Wah Ching gang are criminal street gangs, which in 1994 were rival gangs at war with each other. In January of 1994, Dao, Lam, Jason Ching ("Ching") and Sat

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1. The petitioner was jointly tried with co-defendant Hung Xuong Lam.

2. See Return, Exh. B at 36-39.

Tai Yu ("Yu") were members of the Los Angeles chapter of the Asian Boyz gang. A member of the Wah Ching gang had recently shot Yu in the leg. During that January, Dao, Lam, Ching, Yu and Jimmy Quach ("Quach")(who associated with the Asian Boyz gang but was not a member) "partied" for a couple of weeks in a room at the Travel Lodge Motel on Colorado Boulevard in Pasadena.

On January 21, 1994, Lam had a small semiautomatic handgun in the motel room. He shared the gun with Dao. They would not let anyone else touch the weapon. Ching and another person in the motel room also had a gun. At approximately 8:00 p.m. that evening, Yu asked Quach if he could borrow Quach's car, a blue Honda. Quach agreed, and Yu said he was going to get some food for the group and to rob a car so they would have money for the motel room and other expenses.

Yu drove away with Quach's car and was accompanied by Lam and Dao and another member of the Asian Boyz named John. Yu observed that both Lam and Dao had guns in their possession. Yu drove the Honda and followed a van driven by another member of the Asian Boyz named Player. Other Asian Boyz gang members, Ching, Quong Phan ("Phan"), Peter, Vincent, Teaser, and Hitman, were also in the van. Yu followed the van to the Pasadena Arcade, and soon thereafter followed it to the Arroyo Pool Hall in El Monte.

Huy Huu Tieu ("Tieu"), his uncle Mark, Lin Bao Vuong (also known as Mike), Tan Vuong, and two girls, Kim and Linn, had arrived at the pool hall at approximately 8:30 p.m. While they were shooting pool, Lin Bao Vuong received a page on his pager from one of his friends. Lin

Bao Vuong, Tieu, Tan Vuong and a person referred to as Hoan then went outside to a telephone booth near the pool hall door, and Lin Bao Vuong made a telephone call.

While Lin Bao Vuong was speaking on the phone, Yu drove into the pool hall parking lot. He stopped the Honda in front of the phone booth after Lam told him to stop the vehicle. Everyone inside the Honda identified himself as associated with the Asian Boyz and asked Tieu, Lin Bao Vuong, and the others at the phone booth if they were from Wah Ching. John and Dao got out of the Honda. Dao held a semiautomatic handgun, and John made motions in the area of his waistband as if he had a weapon there. Dao and John both said, "Fuck Wah Ching." When Tieu protested he was not from Wah Ching, Dao and John got back inside the Honda.

The Honda was driven away from the phone booth, but then backed up and returned to the area. A young Asian male ran from the side of the pool hall building up to the phone booth. Lin Bao Vuong said, "What's up, Puppet?" All the occupants of the Honda got out and went with Puppet to where Tieu and Lin Bao Vuong were standing. One of the people from the Honda demanded that Tieu give him his pager and money. Tieu handed over his pager but did not have any money with him.

Tieu ran away after he saw one of the people punch Lin Bao Vuong. Ching ran up from the van and also punched Lin Bao Vuong in the body and face. As Ching punched him, he stated, "Ex-Asian Boyz" and asserted Lin Bao Vuong had joined the Wah Ching gang. Yu and two other Asian Boyz members also joined in hitting Lin Bao Vuong. Meanwhile, Phan held a stick or pole as he

challenged a person near the entrance to the pool hall, asking him what gang he was from.

Yu walked back to the Honda and told Dao and Lam to leave. Lam fired two shots into the air, and Dao turned around and fired one to three shots. Lam and Dao got back into the Honda, and then both the Honda and the van returned to the Travel Lodge Motel.

That evening at approximately 10:00 p.m., El Monte Police Officer Dennis Miller arrived at the Arroyo Pool Hall and observed Lin Bao Vuong lying on the ground near the phone booth outside the pool hall. He was still alive, and paramedics were called to the scene. Officer Miller found three expended small caliber bullet casings in the parking lot near the victim. Thereafter, El Monte Police Detective Kenneth Whary arrived at the scene and observed, in addition to the three expended .25 caliber casings found by Officer Miller, an expended bullet on the ground.

At the Travel Lodge Motel that evening, Quach observed that Dao was jumpy and excited and that Lam was rather quiet. Lam had a gun, and Quach saw him hide the weapon in a laundry bag in the motel room. Dao yelled out that no one should say anything or he would kill him. Dao also said that in case anyone asked, they should say that Puppet from the Hellside gang did it. Dao also indicated that the whole group, including Lam and Ching, had been at the Arroyo Pool Hall. While the people in the motel room were talking, Quach heard them say they thought the victim was Mike or Mickey.

Several days later Dao told Yu that he had thrown

his gun in the sewer. Yu asked Dao what had happened. Dao replied, "Ex-Asian Boyz." Dao also said, "I think I shot him." Sometime after Lin Bao Vuong had been shot,, Tam Tran ("Tran"), a girlfriend of one of the Asian Boyz, was present in the motel room at the Travel Lodge Motel. She heard Lam say he had shot "the guy" at close range with a .22 or .25 caliber gun, and that the person who got shot was an ex-Asian Boyz member who had joined the Wah Ching gang.[3] Lam and Dao also told Tran that they were together when it happened, and they had used a Honda Accord. Dao further indicated to Tran that at the time of the incident there were some young girls in front of the pool hall.

On January 24, 1994, Detective Whary returned with his partner to the scene of the shooting. They discovered on the ground two additional expended bullets. Lin Bao Vuong had died from a gunshot wound to the head. An autopsy indicated he had several bruises about his body and five gunshot wounds, including a fatal through-and-through wound to the head. The bullet entered the left back of his head and exited at his right eyebrow. Lin Bao Vuong also sustained one bullet wound to the left arm, one wound to the left thigh, and two wounds to the right thigh. The coroner also observed a partially removed Asian Boyz tattoo on one arm. Lin Bao Vuong was 14 years old at the time he was killed.

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3. On cross-examination, Tran testified it was Dao, not Lam, who had told her that they killed a person with a .22 or .25 caliber handgun. At the time of her testimony, Tran was on probation for her role as an accomplice in the so-called San Marino murder case, in which two people had been killed.

In October of 1994, Los Angeles County Sheriff Sergeant Rudy Ortega interviewed Quach. Quach stated that Dao had told him that Dao had shot the victim and had gotten away with it, Sergeant Ortega thereafter interviewed Yu, who stated he had seen Lam in possession of a black .22 caliber automatic before anybody left Quach's vehicle. Ballistics tests disclosed that the expended bullets found at the scene of the shooting and the two bullets recovered from the victim's body were .25 caliber bullets, which could have been fired from the same gun.

Los Angeles County Sheriff Sergeant William Howell testified at trial as an expert on Asian gangs in Los Angeles County. According to him, Asian Boyz gang members would not spontaneously engage in a violent act. Assuming members of that gang were involved in the homicide of Lin Bao Vuong, Sergeant Howell opined they committed the crime to promote the Asian Boyz gang by instilling fear in any rival gang and giving the Asian Boyz respect.

In Dao's and Lam's defense at trial, Kenneth Chang, an acquaintance of Dao's defense counsel, indicated that it is possible to join the Asian Boyz gang and thereafter leave the gang. A person could leave the gang by getting "jumped out," meaning leaving after several older boys beat up the departing gang member. Chang had left the gang after approximately a year and knew of several others who also were former Asian Boyz members. While Chang was a member, it was primarily a social group and did not engage in major crimes.

III

On March 31, 2001, petitioner, through his attorney,

filed the pending petition for writ of habeas corpus, which raises the sole claim that the "admission of the nontestifying accomplice's [Phan's] statement to law enforcement while in custody, to prove petitioner's guilt, violated his Confrontation Clause Rights." Petition at 6. On May 8, 2001, the respondent filed an answer, and the petitioner filed a traverse on July 11, 2001.

DISCUSSION

IV

The petitioner's claims must be considered in light of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), which worked substantial changes to the law of habeas corpus. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), cert. denied, 512 U.S. 1111 (1997). Of specific importance to the petitioner's claim are the revisions made to 28 U.S.C. § 2254(d), which now provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The United States Supreme Court has clarified the meaning of the key clauses in Section 2254(d):

> Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000); see also Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.)([A]n 'unreasonable application of clearly established federal law [occurs] when [this Court's] independent review of the legal question does not merely allow [it] ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves [the Court] with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct, and the other, the application of the federal law that the [state] court adopted, was erroneous -- in other words that clear error occurred."). cert.denied, 531 U.S. 944 (2000).

Further, under the AEDPA, a federal court shall presume that the determination of a factual issue made by a state court is correct, and the petitioner has the burden of

rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The California Supreme Court reached the merits of petitioner's claims when it denied his petition for review without citation to authority or a written opinion. Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993). However, "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 2594,115 L.Ed.2d 706 (1991). Thus, in addressing petitioner's claims, this Court will consider the reasoning of the California Court of Appeal, which issued a written decision.

V.

The Confrontation Clause of the Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. The confrontation clause of the Sixth Amendment provides a criminal defendant with the right to face those who testify against him and the right to conduct cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). The right to confront a witness serves the purposes of insuring reliability by means of oath, exposing the witness to cross-examination, and permitting the trier of fact to weigh the demeanor of the witness. California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 28 L.Ed.2d 489 (1970). "The central concern of the Confrontation Clause is to ensure the reliability of the

evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990), Christian v. Rhode, 41 F.3d 461, 468 (9th Cir. 1994).

A defendants right to confrontation, however, is not absolute, In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court formulated a two-part test for determining the admissibility in a criminal proceeding of an out-of-court statement. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Id. at 65, 100 S.Ct. at 2538. Second, once the declarant is shown to be unavailable, the prior testimony is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred . . . where the evidence falls within a firmly rooted hearsay exception . . . [or contains] particularized guarantees of trustworthiness." Id. at 66, 100 S.Ct. at 2539; Llly v. Virginia, 527 U.S. 116, 124-25, 119 S.Ct. 1887, 1894, 144 L.Ed.2d 117 (1999); Christian, 41 F.3d at 467.

The United States Supreme Court in Lilly "was directly presented with the question whether the declaration against penal interest exception to the hearsay rule constitutes a firmly rooted exception." Hernandez v. Small, ___ F.3d at ___, 2002 WL 356296, *4. The Ninth Circuit has noted that in Lily, the plurality of the Supreme Court divided the declaration against penal interest exception to the hearsay rule (which the California Court of Appeal found applicable here) into three subcategories;

> (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense, and (3) evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. In the third subcategory, . . . the plurality concluded that declarations against penal interests 'are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence,' where the statements are 'accomplices' confessions that inculpate a criminal defendant.'

Id. at *4-5 (citing Lilly, 527 U.S. at 127, 134). As to the third subcategory of statements, the Ninth Circuit further noted that the plurality of the Supreme Court explained that within that subcategory "a certain further subset of statements, i.e., statements which attempt to shift or to spread blame by inculpating both the accomplice and the defendant, is inherently untrustworthy." Id. At *7 (citing Lilly, 527 U.S. at 131). The Ninth Circuit in Hernandez then distinguished that subset of the third subcategory statements from the situation before it.

Let us now look at Phan's statements, which the California Court of Appeal summarized, as follow:

> Phan[ ] acknowledg[ed] that he was one of the passengers in the van which left the motel and eventually drove to the Arroyo Pool Hall. Phan told Sergeant Ortega the names of the people in the van with him and that Dao was armed with a .38 caliber semiautomatic pistol. Accompanying the van was

> the Honda, in which Dao, Lam, Yu and anothor person rode. When Phan was at the pool hall, he saw Dao waving the gun inside the Honda. He also saw the people from the Honda approach those by the phone booth. Ching got out of the van and ran over to the group by the phone booth, while Phan went to the entrance of the arcade, held a stick or pole, and issued a gang challenge to someone at the entrance by asking what gang he was from. [¶] Phan further related to Sergeant Ortega that Ching hit one of the people in the group by the phone booth. Someone from Phan's group also took a pager from one of the people in the group by the phone booth. Phan then heard gun shots, but he did not tell Sergeant Ortega who fired the shots. Phan asserted he did not see Lam shoot a gun, hold a gun, or run away.
>
> Return, Exh. B at 40 n.4.

The California Court of Appeal, first, found that Phan was "unavailable" as a witness,[4] Id. at 41. Second, the California Court of Appeal analyzed Lilly and properly concluded that Phan's statements, as an accomplice's statements against penal interest, did not come within a "firmly rooted" hearsay exception for the purposes of confrontation clause analysis. In fact, Phan's statements come within Lilly's third subcategory of statements, but not within the subset which is inherently untrustworthy because it attempts to shift the blame to the defendant. Thus,

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4. Neither petitioner nor respondent challenges the state court's determination that Phan was unavailable as a witness.

although not coming within a firmly rooted exception to the hearsay rule, Phan's statements are not inherently untrustworthy.

To determine the trustworthiness of Phan's statements, the California Court of Appeal considered the circumstances surrounding Phan's statements to determine whether they bore "particularized guarantees of trustworthiness." Specifically, the California Court of Appeal found that "Sergeant Ortega did not make any provision of leniency [to Phan] when Phan made the statements. . . ." Id. at 44 n. 6. The Court of Appeal further found:

> Phan was subpoenaed as a witness by the prosecution in the present case. The prosecutor had drafted a letter addressed to the Board of Prison Terms which stated that Phan had testified truthfully in the present case and this testimony was extremely helpful [to] the prosecution. The prosecutor advised Phan that he would send this letter if in fact Phan cooperated. He also advised Phan that in the event Phan refused to testify he would send a letter to the Board of Prison Terms advising them [sic] of Phan's failure to cooperate. Phan's refusal to testify thus could indicate his prior statements to the officer were not "motivated by a desire to curry favors with the authorities." He, in fact, exposed himself to the prosecutor's damaging letter to be sent to the Board of Prison Terms by his refusal to testify at trial.

Id. Inferentially, the Court of Appeal then determined that Phan's statements had "indicia of reliability" because, in part, "[t]he statements were sufficient to subject Phan to

criminal liability for the murder of Lin Bao Vuong as an aider and abettor in [Lam's and Dao's] killing of Vuong." Id. at 42-43 (citations omitted).

Moreover, the admission of Phan's statements did not violate petitioner's rights under the confrontation clause because the jury was instructed that Phan was an accomplice as a matter of law and that his testimony should be viewed with caution, and that they may only consider his testimony if it was corroborated by other evidence. Reporter's Transcript ("RT") 1001:24-1004:11. This court must assume that the jury followed its instructions and gave no weight to Phan's statements unless the jury found they were corroborated by other independent evidence. Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000) ("[a] jury is presumed to follow its instructions"). Under these circumstances, Phan's statements did not harm petitioner.

Finally, "[a] Confrontation Clause violation is subject to harmless error analysis. Delaware v. Van Arsdale, 475 U.S. 673, 681-84, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986); United States v. Bowman, 215 F.3d 951, 961 (9th Cir 2000). In assessing whether a violation of the confrontation clause was prejudicial, courts should consider the importance of the testimony to the entire case, whether the testimony was cumulative, whether corroborating or contradictory evidence existed, and the overall strength of the government's case. Van Arsdale, 475 U.S. at 684, 106 S.Ct. at 1438.

The California Court of Appeal concluded that any error in admitting Phan's statements was harmless:

We find that even assuming arguendo error regarding the admission of Phan's statements through the testimony of Sergeant Ortega, any error was nonprejudicial. [Lam and Dao] emphasize that Phan placed [them] at the crime scene and Dao was the only person Phan claimed to see armed. Yu had been granted immunity and was an accomplice. Nonetheless, Yu testified that both Dao and Lam fired shots just after Vuong was beaten. Nonaccomplice Tran testified that Dao told her he and Lam had killed a person with a .22 or .25 caliber handgun. A bullet from a .25 caliber gun in fact killed Vuong. Nonaccomplice Quach testified that after the fatal shooting, he saw Lam hide a gun in a laundry bag in the motel room, and Dao yelled that no one should say anything or he would kill him. Dao also said the entire group, including Lam and Ching, had been at the Arroyo Pool Hall. Several days later, Dao told Yu that he had thrown his gun in the sewer. When Yu asked Dao what had happened, he replied "Ex-Asian Boyz," and said, "I think I shot hlm." Quach told Sergeant Ortega that Dao told him that Dao shot the victim and got away with it. Quach was not an accomplice or involved in any pending criminal matter. [¶] We also note that Sergeant Ortega's testimony about Phan's statement was, in view of the testimony of other witnesses, actually of some assistance to [Lam and Dao]. Phan placed Dao at the scene waving a gun around. However, Phan indicated that Dao was in possession of a .38 caliber gun (not a .25 caliber gun), and that he did not see who fired the shots. Phan also indicated he did not see Lam with a gun. Indeed, consistent with Phan's testimony, the jury

> found Lam had not used a weapon and was convicted of the lesser offense of second degree murder. [¶] Under such circumstances, it is most unlikely the jury would have rendered a verdict more favorable to [Lam and Dao] if Sergeant Ortega had not testified at all regarding Phan's statements to him. Accordingly, even assuming arguendo error in admitting Sergeant Ortega's testimony about Phan's statements to him, under any standard of review its admission would be harmless.

Id. at 44-45 (citations omitted).

Here, Phan's statements that petitioner and Dao were carrying guns when they went to the Arroyo Pool Hall, that both were present when shots were fired, and that upon returning to the hotel Dao admitted he had shot Vuong, were consistent with the testimony of Yu, Tran and Quach. See, e.g., RT 402-415, 628-680, 788. Thus, Phan's statements were incriminating to petitioner only in confirming that petitioner was armed and was at the scene of the shooting -- evidence also provided by the testimony of other witnesses. Moreover, the prosecution did not comment at length or unduly focus on Phan's statements. For all these reasons, the admission into evidence of Phan's statements, even if error, was harmless. Brecht v. Abrahamson, 507 U.S. 619, 622, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

Thus, the California Supreme Court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) adopting the Report and Recommendation as the findings of fact and conclusions of law herein; and directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATE: March 21, 2002 s/

ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

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